(3)

No. 06-1278

In the Supreme Court of the United States

MARTIN A. ARMSTRONG, PETITIONER

v.

JOSEPH R. GUCCIONE, UNI 'ED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's confinement for civil contempt, based on his refusal as a corporate custodian to surrender property belonging to the corporation, violated the "Recalcitrant Witness Statute," 28 U.S.C. 1826.

2. Whether petitioner's confinement for civil contempt violated the "Non-Detention Act," 18 U.S.C. 4001(a).

3. Whether petitioner's confinement for civil contempt violated the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 470 F.3d 89. The opinion and order of the district court (Pet. App. 55a-74a) is reported at 351 F. Supp. 2d 167.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2006. On February 21, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 19, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) filed civil enforcement actions in the United States District Court for the Southern District of New York against petitioner and companies he controlled, contending that they violated various provisions of the federal securities and commodities laws. In the course of those proceedings, the district court held petitioner in civil contempt for failing to return missing corporate assets and records to a court-appointed receiver. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241. The district court denied the petition, Pet. App. 55a-74a, and the court of appeals affirmed, *id.* at 1a-54a.

1. In the late 1990s, petitioner allegedly persuaded Japanese investors to invest approximately $3 billion in various companies that he controlled. Petitioner was supposed to use the money to invest in United States securities or futures instruments, while hedging against any exchange-rate risk. Instead, petitioner used the money to engage in risky and speculative trading and for other purposes. Petitioner then sought to hide losses from that trading by presenting false account statements and confirmations to the investors. Over time, the fraudulent investment program turned into a massive pyramid scheme, as petitioner used new investments to pay off old investors and mask the growing losses. In all, those losses totaled nearly $1 billion. Pet. App. 3a-4a, 90a-111a.

2. On September 13, 1999, the SEC and CFTC filed civil enforcement actions in the United States District Court for the Southern District of New York against petitioner and companies he controlled, contending that

they violated various provisions of the federal securities laws. Pet. App. 4a. A grand jury in the Southern District of New York later returned a superseding indictment charging petitioner with 25 counts of securities fraud, wire fraud, conspiracy, and money laundering. *Id.* at 112a-159a.

The SEC and CFTC moved for temporary restraining orders, seeking to freeze the assets of petitioner's companies and to have a receiver appointed to recover corporate assets and records from petitioner and the companies. The district court granted the motions and subsequently converted the temporary restraining orders into preliminary injunctions. Pursuant to the court's orders, the receiver then sought to recover some $16 million in corporate assets (including rare coins, gold bars, and various antiquities), together with corporate records, from petitioner. After petitioner failed to comply, the receiver moved for an order holding petitioner in contempt; petitioner contended that compliance with the court's orders would violate his Fifth Amendment privilege against self-incrimination. Petitioner subsequently returned some of the items, but failed to return approximately $15 million of the assets, along with a missing computer and hard drive. On January 14, 2000, after a hearing at which the receiver produced evidence that the remaining items were still in petitioner's possession (and also produced evidence that files had been erased from other hard drives that petitioner had handed over), the district court held petitioner in civil contempt and remanded him to custody. Pet. App. 4a-8a.

The district court subsequently conducted periodic hearings at which petitioner was given opportunities either to comply with the orders or to demonstrate that

it would have been impossible for him to do so. The district court repeatedly concluded that petitioner's continued detention was appropriate; petitioner repeatedly sought to appeal, but the court of appeals, after briefing and oral argument, dismissed those appeals on the ground that they were interlocutory (and the court therefore lacked jurisdiction). Pet. App. 8a-9a.

3. In 2004, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his confinement for civil contempt violated his Fifth Amendment privilege against self-incrimination and that the district court lacked the authority to continue to confine him for civil contempt. The district court denied the petition. Pet. App. 55a-74a. The court first reasoned that, under *Braswell* v. *United States*, 487 U.S. 99 (1988), "no use can be made of the fact of a simple turnover of corporate assets by a corporate officer," and the court's orders thus did not implicate the Fifth Amendment privilege against self-incrimination. Pet. App. 68a. The court then summarily rejected petitioner's contentions that he could not be confined under the "Recalcitrant Witness Statute," 28 U.S.C. 1826, or the "Non-Detention Act," 18 U.S.C. 4001(a). Pet. App. 68a & n.10.

4. The court of appeals affirmed. Pet. App. 1a-54a.

a. The court of appeals first held that petitioner's confinement for civil contempt did not violate his Fifth Amendment privilege against self-incrimination. Pet. App. 12a-19a. The court of appeals agreed with the district court that "*Braswell* controls here" and that, as a corporate custodian in possession of corporate assets and records, petitioner "cannot escape production by relying on the Fifth Amendment." *Id.* at 13a.

As is relevant here, the court of appeals then held that the district court possessed the authority to con-

tinue to detain petitioner for civil contempt. Pet. App. 20a-48a. With regard to the "Non-Detention Act," the court noted at the outset that the statute provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* at 25a (quoting 18 U.S.C. 4001(a)). The court reasoned that, even "[a]ssuming that the Non-Detention Act has any application to coercive confinement in the face of a finding of civil contempt," its requirement of congressional authorization for detention was satisfied both by the statutes creating the federal courts (which "implicitly vested" those courts with "[t]he power to confine to coerce compliance with court orders") and by 18 U.S.C. 401 (2000 & Supp. IV 2004), which "should be understood to authorize imprisonment on findings of both civil and criminal contempt." Pet. App. 25a-26a.

With regard to the "Recalcitrant Witness Statute," the court explained that the statute authorizes a court to confine a "witness" who "refuses without just cause shown to comply with an order of the court to testify or provide other information" for only 18 months. Pet. App. 37a-38a (quoting 28 U.S.C. 1826(a)). The court concluded, however, that the statute was inapplicable on the ground that, as a custodian of corporate property covered by *Braswell*, petitioner was not a "witness" for purposes of the statute. *Id.* at 38a-39a. The court further reasoned that, even if petitioner were a "witness," he would not be entitled to invoke the statute because "[a]n order requiring the production of money or valuable property, for the purpose of restoring it to its rightful owner, is not an order to provide 'information.'" *Id.* at 41a.

Finally, with regard to petitioner's claim that his continued confinement violated the Due Process Clause

of the Fifth Amendment (which the district court had not addressed), the court of appeals reasoned that "[t]he length of coercive incarceration, in and of itself, is not dispositive of its lawfulness." Pet. App. 42a. Instead, the court explained, "[c]ivil confinement only becomes punitive when it loses the ability to secure compliance." *Ibid.* The court rejected petitioner's contention that, "upon the passage of some specific period of coercive imprisonment that fails to induce compliance, an inference must be drawn of an inability to comply." *Id.* at 44a. The court reasoned that "there is a crucial difference between one who is capable of complying and refuses to do so and one who is not capable of complying," and concluded that contemnors who are unable to comply and contemnors who are unwilling to comply "should not be treated similarly in divining the line between coercive and punitive sanctions.'" *Id.* at 44a n.9 (internal quotation marks and citation omitted). The court of appeals recognized, however, that an individual held in civil contempt who "claims * * * to be incapable of complying with the court's order" is entitled to have the court periodically "reconsider, regardless of past findings, whether the person is presently capable of complying." *Id.* at 47a-48a. After assigning a different judge to the case, the court of appeals therefore asked the district court to convene a new hearing on whether petitioner was able to comply with the court's production orders. *Id.* at 48a, 162a.

b. Judge Sotomayor concurred. Pet. App. 49a-54a. While she concluded that the district court's contempt sanction was valid, she expressed the view that "the eighteen-month maximum duration imposed on a civil contempt sanction by the Recalcitrant Witness Statute should be a presumptive benchmark for all civil con-

tempt incarcerations." *Id.* at 49a. She agreed that "the district court should undertake soon to revisit whether [petitioner's] imprisonment has slipped into the impermissible terrain of a punitive sanction." *Ibid.*

5. On April 27, 2007, the district court, after conducting a hearing, terminated petitioner's confinement for civil contempt, on the ground that the confinement was no longer coercive. Pet. Supp. Br. 1. While petitioner's appeal was pending, he pleaded guilty to the conspiracy charge in the criminal case. Pet. App. 10a. On April 10, 2007, he was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Pet. Supp. Br. 1. Petitioner is currently serving that sentence.

ARGUMENT

Petitioner renews his claims (Pet. 8-29) that his confinement for civil contempt violated the "Recalcitrant Witness Statute," 28 U.S.C. 1826; the "Non-Detention Act," 18 U.S.C. 4001(a); and the Due Process Clause of the Fifth Amendment. The court of appeals' decision with regard to each of those claims is correct and does not conflict with any decision of this Court or of another court of appeals. In addition, because petitioner's confinement for civil contempt has now terminated, this case would be a poor vehicle for considering those claims. Further review is therefore unwarranted.

1. Petitioner first contends (Pet. 10-14) that his confinement for civil contempt violated the "Recalcitrant Witness Statute," 28 U.S.C. 1826. Subsection (a) of that statute provides that, when a "witness" in a federal judicial proceeding "refuses without just cause shown to comply with an order of the court to testify or provide other information," the witness may be confined "until

such time as the witness is willing to give such testimony or provide such information," but "in no event shall such confinement exceed eighteen months." Section 1826(a) is inapplicable here because it applies only to "witness[es]" who refuse to testify or "provide * * * information" in federal judicial proceedings—not to corporate custodians who refuse to return property belonging to their corporations. See, *e.g.*, *Gelbard* v. *United States*, 408 U.S. 41, 73 (1972) (Rehnquist, J., dissenting) (noting that Section 1826(a) "resulted from a desire on the part of Congress to treat separately from the general contempt power of courts their authority to deal with recalcitrant witnesses in court or grand jury proceedings").

a. Petitioner contends (Pet. 11-12) that the court of appeals erred by holding that he was not a "witness" for purposes of Section 1826(a) because his compliance with the order to produce property would not constitute a testimonial communication for purposes of the Fifth Amendment privilege against self-incrimination. But the court of appeals did not so hold; rather, it simply (and correctly) explained that petitioner's argument that he *was* protected by the Fifth Amendment was incorrect because corporate custodians cannot invoke the Fifth Amendment to resist the production of corporate property. Pet. App. 38a-39a (discussing *Braswell* v. *United States*, 487 U.S. 99 (1988)).[1] And petitioner ultimately

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[1] This Court's decision in *United States* v. *Hubbell*, 530 U.S. 27 (2000), on which petitioner relies (Pet. 11-12), is not to the contrary. It merely reiterates the principle that a criminal defendant can invoke the Fifth Amendment privilege in response to a subpoena to produce documents to a grand jury, on the ground that "the act of producing documents in response to a subpoena may have a compelled testimonial aspect" (by "communicat[ing] information about the existence, custody,

concedes (Pet. 13) that "the application of Section 1826 does not turn on whether a person is a witness under the Fifth Amendment."

The linchpin of the court of appeals' analysis of the statute was that, even if petitioner constituted a "witness," the relevant order did not constitute an order to "provide other information" under Section 1826(a), insofar as it sought the return of *assets* (*viz.*, rare coins, gold bars, and various antiquities). Pet. App. 39a-41a. That conclusion is correct, because the items at issue possessed no independent informational value (and thus could not constitute "information" in any sense of the term). Petitioner cites no case holding that similar items of property qualify as "information" for purposes of Section 1826(a). While petitioner relies (Pet. 13) on *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976) (per curiam), that case merely quotes legislative history for the proposition that the phrase "other information" in Section 1826(a) was intended to cover "*all* information given as testimony," including information that is electronically stored on computer tapes or in another medium. *Id.* at 789 n.3 (emphasis added; citation omitted). It does not stand for the broader proposition that "other information" covers any item of property, even if the item possesses no independent informational value.

b. Petitioner contends (Pet. 12-13) that the court of appeals' decision conflicts with the decisions of other courts of appeals. As the court of appeals explained (Pet. App. 40a-41a), however, the cases cited by petitioner are readily distinguishable on their facts, because they involved witnesses who refused to provide hand-

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and authenticity of the documents"). 530 U.S. at 36. As the court of appeals explained, *Hubbell* "did not disturb *Braswell*'s holding with respect to custodians of corporate property." Pet. App. 39a.

writing or voice exemplars—not corporate custodians who refused to return property belonging to their corporations. See *In re Grand Jury Proceedings*, 567 F.2d 281, 282-283 (5th Cir. 1978) (voice exemplars); *United States* v. *Mitchell*, 556 F.2d 371, 384-385 (6th Cir.) (voice exemplars), cert. denied, 434 U.S. 925 (1977); *Palmer*, 530 F.2d at 789 (handwriting exemplars); *In re Lopreato*, 511 F.2d 1150, 1153-1154 (1st Cir. 1975) (handwriting exemplars). Those cases, with which the Second Circuit did not disagree, involved refusals to supply evidence sought for its informational value alone. Here, regardless whether the items sought might have an evidentiary use (as petitioner contends, see Pet. 13-14), they were sought by the receiver because they were "objects of monetary value that are the property of the corporation in receivership." Pet. App. 41a. Because petitioner identifies no case holding that Section 1826(a) is applicable to corporate custodians who refuse to return property belonging to their corporations, petitioner fails to establish the existence of a valid circuit conflict.

2. Petitioner next contends (Pet. 14-20) that his confinement for civil contempt violated the "Non-Detention Act," 18 U.S.C. 4001(a). Petitioner does not contend, however, that the court of appeals' decision in that respect conflicts with any decision of another court of appeals, and his claim of error in the court of appeals' decision lacks merit.

a. Section 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Petitioner asserts (Pet. 15) that 28 U.S.C. 1826(a) is "[t]he only statute that contains the requisite clear and specific grant of authority to imprison civil contemnors" and that, because he was confined for longer than the 18 months

permitted by that statute, he was held in violation of Section 4001(a).

As a preliminary matter, petitioner's argument plainly lacks merit because it would mean that courts lack the power to detain a person in order to coerce compliance with a lawful order unless the person qualifies as a "witness" who is refusing to "testify or provide other information" for purposes of 28 U.S.C. 1826(a). It is well established that courts possess broad inherent power to impose contempt sanctions, even against individuals who do not qualify as recalcitrant witnesses under any conceivable reading of 28 U.S.C. 1826(a). See, *e.g.*, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980); *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821). Petitioner cites no authority for the novel proposition that Congress intended Section 4001(a) to "abrogat[e] the inferior courts' inherent power to incarcerate civil contemnors," Pet. 17, and leave 28 U.S.C. 1826(a) as the exclusive basis for imposing civil contempt sanctions.[2]

b. In any event, the court of appeals correctly held that, "[a]ssuming that the Non-Detention Act has any application to coercive confinement in the face of a finding of civil contempt," Pet. App. 25a-26a, there were two

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[2] The legislative history of Section 4001(a) confirms that it was not intended to limit a federal court's ability to impose contempt sanctions. See, *e.g.*, 117 Cong. Rec. 31,541 (1971) (statement of Rep. Poff) (noting that "[i]t is not the Committee's intent to eliminate any detention practices presently authorized by statute or judicial practice and procedure" and that "[d]etentions incident to judicial administration such as those authorized by * * * judicial contempt powers * * * are not within the intendment of the committee's amendment [adding Section 4001(a)]").

other sources for the authority to confine individuals for civil contempt. *Id.* at 25a-37a. First, the court of appeals held that Section 4001(a)'s requirement of congressional authorization was satisfied by the statutes creating the federal courts, which "implicitly vested" those courts with "[t]he power to confine to coerce compliance with court orders." *Id.* at 26a. The court of appeals correctly so held, because it is well settled not only that federal courts have the inherent power to impose contempt sanctions, but that the contempt power is a product of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, which created the lower federal courts and thereby vested them with the judicial power authorized by Article III of the Constitution. See, *e.g.*, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (noting that "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of th[e] power [to impose contempt sanctions]"); *Anderson*, 19 U.S. (6 Wheat.) at 227 (stating that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with the power to impose * * * submission to their lawful mandates"). Although petitioner contends (Pet. 16) that the statutes creating the federal courts are insufficient because Section 4001(a) requires "a precise and specific grant of congressional authority," nothing in the terms of Section 4001(a) provides that the relevant "Act of Congress" must *explicitly* authorize the detention at issue.

Second, the court of appeals held that, even assuming that Section 4001(a)'s requirement of congressional authorization was not satisfied by the statutes creating the federal courts, it was satisfied by 18 U.S.C. 401 (2000 & Supp. IV 2004), which expressly provides that "[a] court

of the United States shall have power to punish * * * such contempt of its authority * * * as * * * [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Petitioner contends (Pet. 17-20) that Section 401 is inapposite because it authorizes only criminal, and not civil, contempt sanctions. Although Section 401 uses the term "punish," however, it does so only in a generic sense relating to confinement, not in a more specific sense limited to confinement for criminal contempt. As the court of appeals noted, "throughout the history of § 401's predecessor statutes, the term 'punish' has been used indiscriminately to refer to civil and criminal contempt sanctions alike." Pet. App. 37a; see, *e.g.*, *Lamb* v. *Cramer*, 285 U.S. 217, 220 (1932) (so using "punish"); *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) (same). Accordingly, lower courts have consistently concluded that Section 401 authorizes civil, as well as criminal, contempt sanctions. See, *e.g.*, *Britton* v. *Co-op Banking Group*, 916 F.2d 1405, 1409 n.4 (9th Cir. 1990); *Mitchell*, 556 F.2d at 384; *United States ex rel. Shell Oil Co.* v. *Barco Corp.*, 430 F.2d 998, 1000 (8th Cir. 1970). Petitioner seemingly concedes (Pet. 18 n.12) that there is no circuit conflict on that question, and the court of appeals' holding that Section 4001(a)'s requirement of congressional authorization was satisfied by Section 401 (and also by the statutes creating the federal courts) thus does not merit further review.

3. Petitioner further contends (Pet. 21-29) that his confinement for civil contempt violated the Due Process Clause of the Fifth Amendment. That contention also lacks merit.

a. As the court of appeals explained, confinement for civil contempt does not violate due process simply by

virtue of its duration. See Pet. App. 42a. This Court has stated that "the paradigmatic coercive, civil contempt sanction * * * involves confining a contemnor *indefinitely* until he complies with an affirmative command[,] such as an order * * * to surrender property ordered to be turned over to a receiver." *United Mine Workers* v. *Bagwell*, 512 U.S. 821, 828 (1994) (emphasis added; internal quotation marks and citation omitted); see *Chadwick* v. *Janecka*, 312 F.3d 597, 608 (3d Cir. 2002) (Alito, J.) (noting that "*Bagwell* seems to permit a contemnor who has the ability to comply with the underlying court order to be confined until he or she complies"), cert. denied, 538 U.S. 1000 (2003).

If confinement for civil contempt does become punitive rather than coercive, continued confinement would violate due process. Confinement becomes punitive where a contemnor demonstrates an inability to comply with the relevant order. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 761 (1983); *Maggio* v. *Zeitz*, 333 U.S. 56, 74 (1948). In this case, however, both lower courts found that petitioner had failed to demonstrate an inability to comply. See, *e.g.*, Pet. App. 44a n.8 (court of appeals) (concluding that petitioner "has never made a serious effort to demonstrate that compliance is impossible"); *id.* at 68a (district court) (noting that petitioner has repeatedly "not challenge[d] the finding that he has the ability to turn over the assets"). Petitioner provides no support for his contention that, "after some period of confinement, the contemnor's claim of inability to comply *must* be credited." Pet. 21 (emphasis added). While a contemnor's failure to comply for a lengthy period may suggest that the contemnor is unable to comply, see, *e.g.*, *Maggio*, 333 U.S. at 76; *Chadwick*, 312 F.3d at 612 (noting that, "in most cases, after a certain period, the infer-

ence that the contemnor is unable to comply becomes overwhelming"), the lower courts correctly discounted that fact here, both in light of the significant sum of money that petitioner stood to gain by defying the court's orders, see Pet. App. 43a, and in light of the "scant evidence" that petitioner presented to support his claim that he was unable to comply. *Id.* at 7a. The lower courts' fact-bound conclusion that petitioner had failed to demonstrate an inability to comply does not warrant further review.

b. Petitioner alternatively contends (Pet. 25-29) that the courts of appeals are divided on whether confinement for civil contempt becomes punitive where the contemnor demonstrates a "substantial likelihood" that he will not comply, even if he is able to do so. It is true that some courts of appeals (including the Second Circuit in a previous case) have held that confinement can become punitive if there is no "substantial likelihood" (or "reasonable possibility") that the contemnor will comply with the relevant order. See *United States* v. *Lippitt*, 180 F.3d 873, 877-879 (7th Cir.), cert. denied, 528 U.S. 958 (1999); *CFTC* v. *Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530-1531 (11th Cir.), cert. denied, 506 U.S. 819 (1992); *Simkin* v. *United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re Grand Jury Investigation*, 600 F.2d 420, 424-425 (3d Cir. 1979); *Lambert* v. *Montana*, 545 F.2d 87, 91 (9th Cir. 1976); but cf. *Chadwick*, 312 F.3d at 613 (noting that this Court "has never endorsed the proposition that confinement for civil contempt must cease when there is 'no substantial likelihood of compliance'").

The court of appeals' decision in this case, however, does not conflict with those decisions. Although the court of appeals reasoned that "there is a crucial differ-

ence between one who is capable of complying and refuses to do so and one who is not capable of complying," Pet. App. 44a n.9, it stopped short of holding that confinement for civil contempt could *never* become punitive where the contemnor is simply unwilling to comply with the relevant order. Instead, it concluded only that contemnors who are unable to comply and contemnors who are unwilling to comply "should not be treated similarly in 'divining the line between coercive and punitive sanctions.'" *Ibid.* The court of appeals further made clear that the district court should conduct periodic hearings to determine whether petitioner's confinement had become punitive. See, *e.g.*, *id.* at 8a, 44a; *id.* at 52a-53a (Sotomayor, J., concurring). The court of appeals' decision thus does not meaningfully differ from the decisions cited by petitioner. See, *e.g.*, *Lippitt*, 180 F.3d at 878-879 (noting that when confinement for civil contempt becomes punitive depends on the facts of the case and is committed to the discretion of the district court); *Simkin*, 715 F.2d at 37 (noting that, "[a]s long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue"). Indeed, in proceedings following the court of appeals' decision, the district court terminated petitioner's confinement for civil contempt on the ground that there was no "realistic possibility" that he would comply with the underlying orders (and petitioner's confinement had therefore become punitive). See Pet. Supp. Br. 1; 4/27/07 Tr. 99. The district court's reasoning confirms that the court of appeals' decision does not conflict with decisions adopting a "substantial likelihood" (or "reasonable probability") standard.

4. Finally, because the district court has since terminated petitioner's confinement for civil contempt, this

case constitutes a poor vehicle for consideration of the questions presented. Even assuming that the district court's decision does not render the case moot (on the theory that petitioner might be able to receive credit toward his criminal sentence for at least some period of his confinement, if it were unlawful), it suggests that the disposition of the questions presented is of limited practical significance in this case, because it is far from clear whether resolution of any of petitioner's claims in his favor would significantly affect his criminal sentence. At a minimum, the Court may prefer to consider the questions presented in a case involving a civil contemnor who remains confined.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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